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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**PUBLIC COPY**

ADMINISTRATIVE APPEALS OFFICE  
CIS, BAO, 20th Pass, 3/F  
4751 Street NW  
Washington, D.C. 20536

MAR 17 2004

File: EAC 02 132 51553 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a gas station and food market. It seeks to employ the beneficiary permanently in the United States as a cashier supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and argues that the petitioner has the financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is March 22, 2001. The beneficiary's salary as stated on the labor certification is \$24.14 per hour or \$50,211.20 annually.

The petition was filed on March 2, 2002. As evidence of its ability to pay, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the calendar year 2000 and an unaudited income statement for the year ending December 31, 2001. The income statement showed a net income of \$31,994. The tax return indicated that the petitioner declared \$32,991 in ordinary income in 2000. Schedule L of this tax return reflects that the petitioner had \$40,017 in current assets

and \$16,326 in current liabilities, resulting in \$23,691 in net current assets.

On June 14, 2002, the director requested further evidence relevant to the petitioner's ability to pay pursuant to the regulatory requirements set forth at 8 C.F.R. 204.5(g)(2).

The petitioner responded by submitting a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It also advised the director that the beneficiary was not hired in 2001 and that no W-2, Wage and Tax Statement had been issued. The tax return submitted with this response reflects the petitioner's financial data for the calendar year of 2001, thus covering the visa priority date of March 22, 2001. In that year, the petitioner declared ordinary income of \$1,263. Schedule L, accompanying this tax return, indicates that the petitioner had \$65,648 in current assets and \$28,123 in current liabilities. The difference between these figures shows that the petitioner had \$37,525 in net current assets.

The director denied the petition. He determined that the petitioner had not established its ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. The director concluded that the petitioner's 2001 corporate tax return showed neither sufficient taxable income nor net current assets to meet the beneficiary's \$50,211.20 proposed salary. We agree, and would also observe that the petitioner's income statement, showing a net income of \$31,994, initially provided with the petition, does not support its ability to meet the proposed salary of \$50,211.20. Even if its figures would have been more convincing, it is noted that such documentation generally cannot substitute for the regulatory requirements of audited financial statements, federal tax returns or annual reports described at 8 C.F.R. § 204.5(g)(2).

On appeal, counsel submits a copy of one of the petitioner's principal shareholder's bank statements for the month ending October 25, 2002, asserting that it supports the petitioner's ability to pay the beneficiary's salary. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

Counsel's assertion that the funds represented on this shareholder's personal bank statement support the petitioner's ability to pay the beneficiary's salary is also unpersuasive because a corporation is a separate and distinct legal entity from its owners and shareholders. The assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24 (BIA

1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is also noted that such a loan to the corporation could be characterized as a liability to be paid back.

Based on a review of the evidence contained in the record as well as the argument presented on appeal, it cannot be concluded that the petitioner has submitted sufficient convincing evidence to establish its continuing ability to pay the beneficiary's offered wage as of the visa priority date of March 22, 2001.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.